United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

No. 76-4227

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL UNIONS NOS. 1212, 4, 45, 202, 1200, 1220 and 1228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CBS INC.,
Intervenor.

On Petition to Review An Order of the National Labor Relations Board.

BRIEF OF INTERVENOR CBS INC.

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CBS INC.,

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On Petition to Review An Order of the National Labor Relations Board.

BRIEF OF INTERVENOR CBS INC.

PRELIMINARY STATEMENT.

On October 19, 1976, the National Labor Relations Board (the "Board") rendered a Decision and Order, reported at 226 N.L.R.B. No. 85, dismissing in its entirety a complaint which had been issued by the Board's General Counsel against CBS Inc. ("CBS") upon a charge filed by the International Brotherhood of Electrical Workers, AFL-CIO, and seven of its locals (the "Unions" or the "IBEW").

The matter is now before this Court upon the Unions' Petition to Review An Order of The National Labor Relations Board, pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.* (the "Act"). CBS is an intervenor herein, by order of this Court dated November 22, 1976.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.

Whether, under the unique facts of this case, the Board erred in finding (1) that the Unions, by insisting on the presence at collective bargaining negotiations of an official of another labor organization which represented no employees of CBS and which did represent employees of CBS's major competitors, caused a clear and present danger to the bargaining process, due to the temptation available to said official to disclose confidential business information presented by CBS in support of its major proposals, and (2) that the consequent refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(1) and (5) of the Act.

STATEMENT OF THE CASE.

I.

Proceedings Below.

On September 11, 1975, the Unions filed Charge Number 31-CA-5587 with the Board, alleging that CBS had refused to bargain collectively in violation of Sections 8(a)(5) and (1) of the Act.* On December 5, 1975 the Board's General Counsel issued a complaint alleging that CBS had violated the above sections by refusing in September 1975 to bargain with the

*These and other pertinent portions of the Act are reproduced in an addendum at the conclusion of this brief.

Unions' negotiating committee while its membership included an official of the National Association of Broadcast Engineers and Technicians, AFL-CIO ("NABET"). (A. 10.)* NABET is a union which has no collective bargaining agreements with CBS, which does not represent any employees of CBS, and which does represent employees of the American Broadcasting Companies, Inc. ("ABC") and the National Broadcasting Co., Inc. ("NBC")—major competitors of CBS. (A. 75-76.)

On September 9, 1975, CBS had filed its own charge with the Board, Number 31-CB-2025, alleging that the Unions had refused to bargain collectively during negotiations in September 1975 by insisting on the presence of a NABET representative, in violation of Section 8(b)(3) of the Act. (A. 55, 185-186.) On December 11, 1975, the Board's Regional Director, Region 31, refused to issue a complaint thereon, and on February 4, 1976, CBS's appeal from that refusal was denied by the Office of the General Counsel.

On February 24-25, 1976, a hearing was held before Administrative Law Judge Martin S. Bennett on the complaint issued against CBS. CBS presented evidence that (1) the bargaining process in September 1975 necessarily was going to include disclosure by CBS of confidential information regarding technological innovations and business plans, in support of proposals for changes in the existing agreement, (2) confidentiality regarding that information was imperative due to the intensely competitive nature of the broadcasting industry, and thus (3) at the outset the presence of

*"A. 10" refers this Court to Page 10 of the parties' joint Appendix. Similar references will be made throughout this brief.

an official of NABET, a union with which CBS had no statutory or professional relationship, foreclosed full and open negotiations because of the temptation available to that official to disclose confidential information, thereby constituting a clear and present danger to the bargaining process.

Prior to the hearing on February 24, CBS moved for a protective order to preserve the confidentiality of its trade secrets and business plans. (A. 35-39.) However, in lieu of such an order, the parties agreed to the following stipulation:

> "Stipulated that during the course of the negotiations the Company intended to present information as to new equipment, and processes that come within the category of trade secrets and confidential business plans which would give the Company a competitive advantage over other broadcasters. It is further stipulated that the introduction and use of such new equipment and processes might require changes in the terms and conditions of employment as set forth in the collective-bargaining agreement between the Company and IBEW." (A. 255.)

As a result, the testimony presented at the hearing by CBS described confidential information only in general terms.

On June 23, 1976, Judge Bennett issued his recommended Decision and Order, which dismissed the complaint in its entirety, concluding that the inclusion of a NABET official on the Unions' negotiating committee constituted a "clear and present danger" to the bargaining process, and thus that CBS did not violate Sections 8(a)(5) and (1) of the Act. (A.

264-270.) Based on the entire record, the Judge made detailed findings of fact and conclusions of law in support of his Decision, including a finding that the chief negotiator and sole witness for CBS, James F. Sirmons, was "an impressive witness." (A. 268.)

Thereafter, the General Counsel and the Unions filed exceptions and supporting briefs with the Board. CBS filed an answering brief, and a cross-exception and supporting brief. On October 19, 1976, the Board issued its Decision and Order (reported at 226 N.L.R.B. No. 85) affirming the findings, conclusions and Decision of Judge Bennett, and dismissing the complaint in its entirety. The members of the Board who participated in the decision were John H. Fanning, Howard Jenkins, Jr., and John A. Penello. (A. 271.)

II.

Statement of Facts.

General Background.

The Board found that from approximately 1938 to 1951, CBS and the Unions were signatory to a series of collective bargaining agreements covering the work of broadcast technicians employed by CBS. Those agreements were simple in form, essentially covering work relating to the installation and maintenance of equipment involved in radio broadcasting. (A. 148, 265, 271.)

In 1951, the Unions were first certified by the Board to represent a nationwide unit of broadcast technicians employed by CBS. In 1952, CBS and the Unions entered into a new collective bargaining agreement, covering the work of broadcast technicians in both the radio industry and the newly developing television industry. (A. 147-149, 265.)

From 1952 to and including negotiations in 1969, CBS and the Unions engaged in relatively uneventful collective bargaining negotiations, during which the Unions sought typical benefits such as better wages and working conditions, as well as greater restrictions on management prerogatives. The relationship between CBS and the Unions was generally amicable. (A. 149-150.)

Subsequent to 1969, however, CBS foresaw drastic changes in the broadcast industry, as sophisticated electronic cameras and input devices were being developed. Accordingly, CBS began to develop strategic business plans for its assumption of a leadership position in the innovative use of the new technology. For example, at that time on an experimental and limited basis CBS began to use an electronic camera for news-gathering purposes in the Washington, D.C. area. (A. 150-151.)

Under the existing agreement between CBS and the Unions, the Unions had broad jurisdiction over all electronic work, when that work is done in connection with broadcasting and within territorial limits set forth in the agreements.* Accordingly, CBS was obligated to assign operation of the new electronic camera to the Unions.** However, a major problem arose because the primary focus of the agreement between CBS and the Unions was on electronic work in studio operations,

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*Section 1.03 of that agreement provided, *inter alia,* that such agreement shall cover all of the following work:

> "In connection with the installation . . . operation, maintainance and repair of radio broadcast, television, sound effects, facsimile and audio equipment and apparatus by means of which electricity is applied in the transmission, transference, production or reproduction of voice, sound and/or vision with and/or without ethereal aid, ..."

**To date, there have been no jurisdictional disputes arising from such assignment, nor have any other labor organizations been assigned those duties.

rather than in news-gathering operations at on-site locations. It was the International Alliance of Theatrical and Stage Employees (the "IATSE"), with jurisdiction over the operation of film cameras, which traditionally had performed news-gathering duties at on-site locations. (A. 153.) Thus, during the experimental program in Washington, D.C., CBS came to realize that it would be necessary to make changes in its agreement with the Unions, in order to accommodate the dramatic change in the type of work falling within the Unions' jurisdiction. (A. 151-153.)

The 1972 Negotiations.

The Board found that the negotiations between CBS and the Unions in 1972 (the "1972 Negotiations") were "of some relevance to the instant dispute." (A. 265, 271.) During those negotiations, the Board found that CBS proposed the changes and clarifications which it had determined were necessary in order for it to assume a leadership position in the use of the new electronic equipment. When the Unions expressed skepticism, CBS explained and supported its proposals by disclosing confidential information regarding the existence of the new technology and business plans for the innovative use thereof. (A. 162, 265, 271.)

For example, in the production field, CBS proposed limited exceptions to the Unions' broad jurisdiction over electronic work, in order to allow non-technician artists and specialists to operate new electronic input devices, such as a character generator and a Telestrator. (A. 157.)* At that time, information regarding CBS's

*A character generator is an electronic keyboard which instantaneously creates letters and numbers, and a Telestrator is a free hand device used to create images on a light panel. (A. 156-157.)

plans for the integrated use of those devices was unknown to competitors of CBS. (A. 163-164.)

Also, in the news field, CBS proposed a relaxation of the rigid requirements of the meal periods provision in the parties' contract. The Board found that such proposal was made in order to allow the widespread use of a new portable electronic camera (the "E.N.G. Camera") for the instantaneous broadcast of live news coverage. (A. 265, 271.) Such on-site coverage would require flexible work schedules, which were not possible under the existing agreement. When the Unions expressed skepticism, CBS actually produced a prototype of a similar camera, and disclosed confidential plans for the innovative use thereof. (A. 163.)

Those plans included information regarding the anticipated use of the E.N.G. Camera in conjunction with a new "window" microwave transmitter, which would allow the E.N.G. Camera to operate inside a building and then immediately transmit through any window to a nearby base station, such as a mobile van. Also, it was disclosed that a new "four horn polarized receiving antenna" would be used at the studio in order to achieve 360° microwave pick-up from the mobile base station, and thereby render live news coverage more feasible and practical. (A. 49.)

The Board found that as a result of the disclosure of confidential information, the Unions agreed to relax the jurisdictional and meal periods provisions. (A. 265, 271.) Such modification was expressed in Supplementary Letters of Intent and Understanding appended to the 1972 Agreement. (A. 164, 256.) CBS was thereby able to achieve the flexibility which was an absolute prerequisite to its widespread use of the new technology. (A. 164.)

Confidentiality regarding the E.N.G. Camera was mandatory under standard non-disclosure understandings between potential customers and manufacturers who are mutually discussing developmental activity. (A. 163.) Furthermore, confidentiality regarding the E.N.G. Camera and planned uses thereof was also necessary due to the intensely competitive nature of news gathering in the television industry. Thus, the Board found that because competitors of CBS were not aware of its plans for use of an E.N.G. Camera, CBS gained valuable "lead time" of at least one year in broadcasting live news coverage.* (A. 164-165, 167, 265-266, 271.)

For example, as the Board expressly found, during former President Nixon's visit to the Middle East in 1974, CBS was the only network using an electronic news camera and thus was the only network able instantaneously to broadcast live coverage of the events. (A. 265, 271.) Also, CBS was the only network to use the E.N.G. Camera to broadcast live coverage of the vigil outside the Hearst residence in San Francisco after the Patricia Hearst kidnapping. (A. 166-168.) Other networks covering those events with film cameras were obliged, before broadcast, to transport their film back to their respective facilities for processing and editing. (A. 51, 266.)

The Board found that the Unions have consistently recognized and agreed to the confidential nature of information disclosed by CBS regarding new technology and business plans for the innovative use thereof. Indeed, during negotiations for the 1972 Agreement,

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*ABC and NBC did not have similar equipment for over one year, until September 1974. Moreover, presently CBS has substantially more E.N.G. Cameras than either of the other networks. (A. 50, 164.)

the parties expressly recognized the need for an ongoing mechanism by which CBS could convey such information to the Unions on a confidential basis, and accordingly they provided for, and thereafter participated in, Quarterly Consultation Meetings for that purpose, as set forth in § 2.06 of the 1972 Agreement. The Board found that no NABET representatives have ever been present at such meetings, and the Unions have never breached their understanding of confidentiality with CBS by disclosing information gained from those meetings. (A. 169, 266, 271.)

The 1975 Negotiations.

The 1972 Agreement was effective to and including September 30, 1975. Prior to negotiations for a new agreement, CBS conducted a systematic study to determine changes in the 1972 Agreement which would be necessary in order to accommodate new technological advances and business plans for the use thereof. The Board found that CBS planned to provide the Unions with confidential information regarding those advances and plans to an extent even greater than during the 1972 Negotiations, in order fully to support its proposals. (A. 170-171, 266, 271.)

For example, the Board found that, in the production field, CBS intended again to propose specific exceptions to the Unions' broad jurisdiction over electronic work, in order to allow non-technician artists and specialists to use new electronic input devices and equipment which were beginning to replace the traditional tools used by those employees. Those input devices included (1) further advances in the character generator area, involving the introduction of an electronic camera itself as an input device, (2) a free-hand electronic pallet allowing the

production of art work in drastically new ways, and (3) a digital "still store" device allowing electronic storage of still visuals for instant push-button retrieval. The competitors of CBS were unaware of the existence of those input devices and/or of CBS's innovative plans for the integrated use thereof. (A. 203-205, 265, 271.)

Likewise, the Board found that, in the news field, CBS intended to propose various changes in the 1972 Agreement in order to accommodate comprehensive plans for the worldwide use of new electronic news-gathering equipment. For example, CBS intended to make proposals for (1) the right to hire free lance technicians within the Unions' 200 mile jurisdictional radius of each station, when necessary to cover fast-breaking news events,* (2) a flat wage rate for technicians working overseas, in order to make it feasible to send technicians to such locations, (3) reduction of penalty amounts associated with the meal periods provision, and (4) the right to call technicians on their day off regarding their work schedule the following day. (A. 205-208, 265, 271.)

In support of those proposals, CBS intended to reveal confidential information regarding its business plans for conversion to an all-electronic news-gathering operation. That information was to include (1) plans for the widespread use of a new miniature electronic news gathering camera (the "Microcam"), (2) plans for the widespread use of a new electronic editing device, (3) the precise number of electronic cameras and associated equipment to be used, and (4) plans for

*That right is well established in film oriented agreements which typically cover news-gathering operations. (A. 206.)

electronic coverage of the 1976 political campaigns and conventions. CBS felt, and the Board found, that confidentiality regarding the above information was imperative, in order for CBS to gain valuable lead time over competitors,* and to enhance its image as an innovative leader in the use of new technology. (A. 206-207, 265, 271.)

On or about July 14-15, 1975, the Unions and CBS initiated collective bargaining negotiations at Ossining, New York, for a new contract to replace the 1972 Agreement (the "1975 Negotiations"). (A. 79.) On those dates the Unions' negotiating committee contained only persons who were affiliated with the Unions. The Board found that CBS presented its proposals in contract language form, which did not, as such, involve disclosure of confidential information. (A. 81, 83, 171-172, 266, 271.)

Subsequently, on or about September 3, 1975, the Unions and CBS met in San Diego, California in order to resume the 1975 Negotiations. (A. 83, 178.) The Board found that on September 4, 1975, for the first time in those negotiations, and for the first time in approximately 35 years of bargaining history between the parties herein, the Unions introduced as members of their negotiating committee persons who were not affiliated with the Unions, to wit: two representatives of the IATSE, Messrs. Frank Barnhart and Richard

*For example, in September 1975, the major competitors of CBS were still in the process of ordering the first generation E.N.G. Cameras, and thus it was essential that they not learn of CBS's plans for use of the new Microcam, which was more mobile and more efficient to operate. The Unions stipulated that maintenance of confidentiality regarding trade secrets and business plans would give CBS a competitive advantage. (A. 70-71, 255.)

Nimmo. (A. 86, 181, 266, 271.) At that time CBS objected to the presence of IATSE representatives, believing that good faith negotiations would be impeded because of the many jurisdictional disputes and contradictory claims which existed between the Unions and IATSE. However, because IATSE does represent some CBS employees and is signatory to many contracts with CBS, the Board found that CBS decided to and did continue bargaining, with all of its rights expressly reserved. (A. 182-183, 266, 271.) Although IATSE was not a party to the negotiations, at least it did have a professional and statutory relationship with CBS.

Thereafter, on September 8, 1975, the Unions introduced for the first time as a member of their negotiating committee a Mr. Nolan, an International representative and 10th District Vice-President of NABET.* At all times material herein NABET had no collective bargaining agreements with CBS, represented no employees of CBS, and did represent employees of ABC and NBC, major competitors of CBS. Unlike the Unions and IATSE, NABET did not have a professional and statutory relationship with CBS, did not have a duty to represent the interests of CBS employees, and thus did not have a stake in the economic viability of CBS. Hence, because support for proposals advanced by CBS necessarily was going to include revelation of highly confidential information regarding technological innovations and business plans, CBS contended,

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*On that single day only, Ms. Shery Wolfe [sic], an employee of a small independent radio station in New Jersey and an Assistant to the Business Manager of IBEW Local 1212, was also present. (A. 90.) Although she was not employed by CBS, she was affiliated with the Unions, and thus her status differed from that of the NABET representative. CBS did not consider her presence an absolute impediment to bargaining. (A. 90-91, 267, 271.)

and the Board found, that the presence of Mr. Nolan constituted a serious impediment to the bargaining process, due to the temptation available to Mr. Nolan subsequently to disclose that confidential information. (A. 91-92, 184, 268, 271.)

However, as the Board found, the Unions insisted that CBS bargain with their committee while the NABET representative was present. (A. 267, 271.) Accordingly, on September 9, 1975, CBS filed an unfair labor practice charge, alleging that the Unions had refused to bargain collectively in violation of Section 8(b)(3) of the Act.* (A. 55, 185-186.)

From September 8, 1975, to September 30, 1975, the Unions and CBS continued to meet in San Diego in an attempt to resolve their dispute, although they did not engage in collective bargaining negotiations because of the continuous presence of a NABET representative. (A. 186.) The events that transpired during that period is the subject of the refusal-to-bargain complaint issued against CBS in the instant case.

On or about September 9, 1975, the Unions proposed that the parties negotiate regarding proposals support of which did not involve confidential information. (A. 97.) CBS did not consider such piecemeal bargaining to be a feasible alternative, because (1) all of the Unions' major noneconomic proposals involved subject matters identical to those which were the focus of CBS's proposals, and (2) in any event, as the Board found, meaningful bargaining necessarily involves a give-and-take, *quid pro quo* process wherein both par-

*On December 11, 1975, the Board's Regional Director, Region 31, refused to issue a Complaint on the charge filed by CBS, and on February 4, 1976, an appeal to the General Counsel was denied. (A. 186.)

ties' proposals are balanced against each other, and piecemeal bargaining would have thus caused severe prejudice to CBS's proposals—a result which the Board found Section 8(a)(5) of the Act did not require. (A. 191, 246, 257-260, 267, 271.)

On or about September 16, 1975, the Unions suggested the concept of a confidentiality pledge to be executed by both negotiating committees. CBS asked for a specific proposal to consider, including protective or remedial measures in the event of a breach of such pledge by the NABET representative. CBS was concerned about the reliability of such a pledge by that representative, because it did not have an ongoing collective bargaining relationship with NABET, as it did with the Unions. That distinction was significant because the professional and statutory relationship between CBS and the Unions provided a deterrent effect on bad faith conduct by either of those two parties, due to the disruptive influence such conduct would have on all of their future contract negotiations. Additionally, the Unions, unlike NABET, had a duty to represent the interests of CBS employees, and thus had an inherent interest in preserving the confidentiality of business information which would enhance the economic viability of CBS. Hence, the Board found that the aforesaid deterrent effect simply was not going to be operative on the conduct of NABET. (A. 269.) In any event, as the Board found, the Unions declined to present a full proposal, and the matter was not further discussed. (A. 138-141, 169, 219-220, 237-238, 267, 271.)

On September 19, the Board found that instead of Mr. Nolan, a Mr. Lynch, International President

of NABET, was present as a member of the Unions' Committee. On or about that date, and thereafter, Messrs. Barnhart and Nimmo of the IATSE were not present at the negotiations. (A. 192, 267, 271.)

On September 22 the parties met, and for a brief period of time while the NABET representative, Mr. Lynch, was absent from the room, the Board found that the Unions and CBS did engage in collective bargaining negotiations. Bargaining was discontinued upon Mr. Lynch's return. (A. 111-112, 267, 271.)

The Board found that on or about September 24, in an attempt to develop an alternative manner in which to proceed, CBS suggested that the parties use the time in San Diego productively by meeting in sub-committees to exchange information and thus facilitate eventual agreement on a new contract. The Unions refused, stating that all discussions must take place across the bargaining table while the NABET representative was present.* (A. 112-113, 267-268, 271.)

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*At p. 11 of the Unions' opening brief filed with this Court (the "Opening Brief"), they state as follows regarding the meeting of September 24:

> "Either at that meeting, or that of the 22nd, Sirmons [James F. Sirmons, chief negotiator for CBS] stated that he didn't care what the IBEW did as far as passing on any information imparted at bargaining sessions to Lynch [the NABET representative], as long as that was done outside the actual negotiating sessions." (Citing A. 112-113.)

The Unions are referring, in a rather misleading manner, to testimony given at the hearing before Judge Bennett by Andrew J. Draghi, chief negotiator for the Unions, and are not referring to testimony given by Mr. Sirmons or to a finding by the Board. Even then, the Unions badly bowdlerize Mr. Draghi's testimony, which was as follows:

> ". . . [A]nd as I recall it, he stated that what we did as far as passing on this information to Mr. Lynch outside of the committee meetings was up to us." (A. 112-113.)

On or about September 30, the Unions and CBS agreed to extend the 1972 Agreement for a five-month period, until February 29, 1976.* (A. 231-233.)

The 1976 Negotiations.

Thereafter, the parties resumed negotiations without a NABET or IATSE representative present. Those negotiations took place in Santa Barbara, California from January 6 to January 21, 1976, and in San Diego, California, from January 28 to February 4, 1976 (the "1976 Negotiations"). (A. 192-193.)

During the 1976 Negotiations, because the impediment created by the presence of a NABET representative was removed, the Board found that CBS did present all the above proposals, and confidential information in support thereof, which it intended to present during the 1975 Negotiations. (A. 208, 268, 271.) The Board also found that those proposals permeated the 1976 Negotiations, involving approximately 75% of all the bargaining time. (A. 268, 271.)

As a result of the 1976 Negotiations, and subsequent to the close of the hearing before Judge Bennett, CBS and the Unions entered into a new collective bargaining agreement.

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*At pp. 12 and 32 of their Opening Brief, the Unions state as follows regarding the meeting of September 30:

> ". . . Sirmons bluntly stated that 'there wasn't one god-damn thing he was going to discuss in front of NABET.' " (Citing A. 117.)

Once again, in a rather misleading manner the Unions are referring to testimony given at the hearing before Judge Bennett by Andrew J. Draghi, and are not referring to testimony given by Mr. Sirmons or to a finding by the Board.

SUMMARY OF ARGUMENT.

I.

The Board and the courts have recognized that parties to collective bargaining do not have an absolute right to select their own negotiators. The right of selection has consistently been subordinated to the basic policy of the Act to promote meaningful bargaining. *NLRB v. International Ladies Garment Workers Union,* 274 F.2d 376 (3d Cir. 1960); *NLRB v. Kentucky Utilities Co.,* 182 F.2d 810 (6th Cir. 1950); *Bausch & Lomb Optical Co.,* 108 N.L.R.B. 1555 (1954). Thus, an employer's refusal to bargain does not violate Sections 8(a)(5) and (1) of the Act when, as the Board found in the instant case, the membership of the Unions' negotiating committee constitutes a "clear and present danger" to the collective bargaining process. *General Electric Co. v. NLRB,* 412 F.2d 512 (2d Cir. 1969). The basic issue before this Court is whether, under the unique facts of the instant case, the Board erred in making such a finding.

II.

This Court possesses a limited scope of review with respect to the Board's Decision in the instant case. The Board's findings of fact must be deemed conclusive if supported by substantial evidence on the record considered as a whole, and its conclusions regarding the interpretation of Sections 8(a)(5) and (1) of the Act must be upheld if they have a reasonable basis in law, in that the Board is the agency whose special duty is to administer the Act. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951); *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944); *NLRB*

v. James Thompson & Co., Inc., 208 F.2d 743 (2d Cir. 1953); Section 10(e) of the Act. In fact, in upholding the Board's finding of a violation of Sections 8(a)(5) and (1) of the Act in *General Electric, supra,* this Court expressly recognized that determinations regarding permissible cooperation between unions are for the Board in the first instance to make. 412 F.2d at 520.

III.

In light of the unique facts herein, the Board's finding that the inclusion of a NABET representative on the Unions' negotiating committee constituted a "clear and present danger" to the bargaining process, and that the consequent refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(5) and (1) of the Act, must be upheld by this Court.

As the Board found, the inclusion of a representative of NABET on the Unions' negotiating committee completely impeded full and open discussion of CBS's major proposals, because of the temptation available to NABET to disclose confidential business information which CBS necessarily was going to present in support of those proposals. Such temptation existed because NABET represented employees of the major competitors of CBS and did not represent any employees of CBS. As such, the primary interest of NABET was necessarily in the economic viability of said competitors, and not of CBS.

Most importantly, unlike the factual situation assessed by the Board and this Court in *General Electric Co. v. NLRB, supra,* cited by the Unions in their Opening Brief, the Board found that the danger confronting the Unions in the instant case was indeed

"clear and present," because CBS, unlike the employer in *General Electric,* could not even begin to bargain with the option simply to withdraw when and if the event it feared actually occurred. Once confidential information was presented by CBS, it could not prevent subsequent disclosure. Indeed, NABET could very well have disclosed confidential information *after* the 1975 Negotiations were completed.

Thus, the Unions are simplistic and misleading in characterizing the Board's decision herein as rejecting application of the result reached in *General Electric* solely because NABET represented no employees of CBS. It is clear that the basis for the Board's decision was a demonstrable difference between the nature and immediacy of the danger to the bargaining process which existed in each case.

Likewise, the Unions are misleading in their attempt to suggest that CBS's refusal to bargain in the instant case raises the issue of whether a union may properly bargain on behalf of employees of competing employers. CBS has never contended that it would refuse to bargain with the Unions if they also represented employees of a competing employer, because the Unions, unlike NABET, still would have a duty to CBS employees to preserve the confidentiality of business information, in order not to injure the economic viability of CBS.

Finally, it is clear that the Unions must fail in their contention that CBS's argument regarding confidentiality is merely pretextual. In dismissing the complaint against CBS, the Board clearly found otherwise. Because that finding has substantial support in the record considered as a whole, it must now be deemed conclusive by this Court. Section 10(e) of the Act, 29 U.S.C. 160(e).

IV.

In any event, independently of the above argument and in addition thereto, CBS submits that the Unions possess no express right under the Act to select as members of their negotiating committee persons who are not affiliated with the Unions. The word affiliated, as used herein, is intended to include employees, agents, consultants, and attorneys retained by the Unions.

While § 8(b)(1)(B) of the Act expressly grants to employers the right freely to select the members of their negotiating committee, the Act does not expressly grant a corresponding right to labor organizations. Section 7 of the Act merely grants to individual employees the right freely to select their bargaining agent, and it does not, in turn, grant to that agent the right freely to select members of its negotiating committee. The difference in statutory language reflects well-considered Congressional policy, in that Section 7 of the Act is designed to protect the interests of individual employees from both the whims of the employer *and* the bargaining agent.

ARGUMENT.

I.

An Employer's Refusal to Bargain Does Not Violate Sections 8(a)(5) and (1) of the Act if, as the Board Found in the Instant Case, the Membership of a Union's Negotiating Committee Constitutes a Clear and Present Danger to the Bargaining Process.

The Board and the courts have recognized that parties to collective bargaining do not have an absolute right to select thier own negotiators. The right of selection has consistently been subordinated to the basic policy of the Act to promote meaningful bargaining.

Thus, in *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555 (1954), the Board held that an employer could lawfully refuse to bargain with a union conducting a competing business, because the very existence of such a dual interest on the part of the union changed the climate at the bargaining table "to one in which, at best, intensified distrust of the Union's motives would be engendered." 108 N.L.R.B. at 1561. The Board concluded, in words applicable to the instant case:

> ". . . We do not believe it is incumbent upon the Board to hold, in a situation such as is involved here, which possesses latent dangers, that merely because the hazards which can be anticipated have not yet been realized, the Respondent-employer is nonetheless under a statutory duty to bargain. *We do not mean to imply that given the opportunity the Union would inevitably take advantage of its position in the manner heretofore indicated. It is enough for us that it could*

and that the temptation is too great." *Id.* at 1562. (Emphasis added.)

Likewise, in *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950) the union selected one Braswell, a former employee and an international representative, to negotiate with the employer. Because Braswell had previously expressed hostility to the employer,* the employer refused to negotiate with him. The Sixth Circuit held that under the circumstances, the employer's conduct was not an unfair labor practice:

> ". . . The duty to bargain collectively presupposes negotiations between the parties carried on in good faith, with a common willingness among the parties to discuss freely and fully their respective claims and demands and, when they are opposed, justify them on reason. . . . Collective bargaining is a two-sided proposition; it does not exist unless both parties enter the negotiations in a good faith effort to reach a satisfactory agreement. . . . *Just as collective bargaining in form only and lacking in substance has been condemned, certainly collective bargaining in form only without good faith negotiating on the other side should not be required.*" 182 F.2d at 813. (Emphasis added.)

Also, in *NLRB v. International Ladies Garment Workers Union*, 274 F.2d 376 (3d Cir. 1960), one Robert Mickus, a former union official, was selected as chief negotiator for an employers' association. The union refused to negotiate with Mickus, claiming that in his former position he had access to highly confiden-

*He had stated that he had a grudge to settle with the employer, and that he hoped the employer would go broke financially. 182 F.2d at 812.

tial information regarding the union. The Third Circuit held that the union's conduct was not an unfair labor practice, stating:

> ". . . [A]ny collective bargaining done with Mickus would be 'in form only without good faith negotiating on the other side.' . . . As the Board itself said in *Bausch & Lomb Optical Co.*, 108 N.L.R.B. at page 1561, it would result in bargaining in which, 'at best, intensified distrust of the Union's [Association's] motives would be engendered.'
>
> "We conclude that the Association clearly displayed an absence of fair dealing . . . in selecting and insisting upon Mickus as its bargaining representative, and thus that its offer to bargain was not made in good faith." 274 F.2d at 379. (Citations omitted.)

It is clear that the principle which may be gleaned from the above cases is that when a party's selection of a negotiator creates a serious impediment to the bargaining process, the other party may lawfully object by refusing to bargain. That principle, of course, reflects the basic policy of the Act—promotion of meaningful bargaining.* Indeed, in the very case upon which the Unions attempt to rely, *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969), this Court expressly recognized that a refusal to bargain would be privileged and lawful if the membership of the other party's negotiating committee constituted a "clear and present danger" to the collective bargaining process. 412 F.2d at 520.

**See*, § 1 of the Act, "Findings and Declaration of Policy", 29 U.S.C. 151; *see also, Bausch & Lomb, supra,* at 1556.

In the instant case, unlike in *General Electric,* the Board found that such a danger to the bargaining process did exist, and that the consequent refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(5) and (1) of the Act. The basic issue now before this Court is whether, under the unique facts of this case, the Board erred in making that finding.

II.

This Court Possesses a Limited Scope of Review With Respect to the Decision Rendered by the Board in the Instant Case.

As a threshold matter, it must be recognized that this Court possesses a limited scope of review with respect to the decision rendered by the Board in the instant case. Thus, Section 10(e) of the Act expressly provides, in pertinent part:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Consistent with the above statutory provision, this Court has heretofore recognized that facts, and inferences to be drawn therefrom, are for the trier of fact and the Board to determine in the first instance. In *NLRB v. James Thompson & Co., Inc.,* 208 F.2d 743 (2d Cir. 1953), the Court, by Judge Learned Hand, stated as follows:

> "Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow

for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test." 208 F.2d at 746.

In addition, it has also been generally recognized that reviewing courts have a limited scope of review with respect to the Board's conclusions regarding the interpretation and application of the Act. Thus, in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), a case involving interpretation of the term "employee" within the meaning of the Act, the United States Supreme Court discussed at length the scope of review with respect to the Board's ultimate conclusions, as follows in pertinent part, in words clearly applicable to the instant case:

> "Everyday experience in the administration of the statute gives . . . [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. *Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board.*"

". . . Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. . . . [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, *the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.*" 322 U.S. at 130-131. (Footnotes and citations omitted, emphasis added.)

Likewise, more recently, in its landmark decision, *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951), the Supreme Court, by Mr. Justice Frankfurter, stated:

"To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. *Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.* Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would

> justifiably have made a different choice had the matter been before it *de novo*." 340 U.S. at 488. (Emphasis added.)

In fact, in the very case upon which the Unions attempt to rely, *General Electric Co. v. NLRB, supra,* this Court, in deciding to uphold the Board's finding of a violation of Sections 8(a)(5) and (1) of the Act, stated as follows regarding the role of the Board:

> ". . . Nevertheless, cooperation between unions is not improper up to a point *and it is for the Board in the first instance to determine whether the line has been crossed.*" 412 F.2d at 520. (Emphasis added.)

In the instant case, Judge Bennett, and the Board by affirmation, made detailed findings of fact regarding all of the relevant events. A summary of those findings, and citations to the record in support thereof, are set forth above in the Statement of Facts. Both Judge Bennett and the Board concluded that, in the unique circumstances of this case, the inclusion of a NABET official on the Unions' negotiating committee impeded full and meaningful bargaining because of the temptation available to that official to disclose confidential business information, and that the consequent refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(5) and (1) of the Act. (A. 268-269, 271.) As CBS now demonstrates, such findings, made by the initial trier of fact and by the agency whose special duty is to administer the Act, have substantial support in the record and thus must be upheld by this Court.

III.

In Light of the Unique Facts Herein, the Board Correctly Determined That the Inclusion of a NABET Representative on the Unions' Negotiating Committee Constituted a Clear and Present Danger to the Bargaining Process, and That the Consequent Refusal to Bargain by CBS Was, Therefore, Not In Violation of Sections 8(a)(5) and (1) of the Act.

In the instant case, both Judge Bennett and the Board found that the Union's insistence on the presence of a NABET official during negotiations caused a "clear and present danger" to the bargaining process, and that the consequent refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(5) and (1) of the Act. The Board found that such danger existed due to the temptation available to NABET—as a union which represented the interests of the employees of CBS's competitors, and not the interests of any employees of CBS—to disclose the confidential business information which CBS necessarily was going to present in support of its major proposals.* The possibility that NABET would choose to disclose confidential information, in an effort to protect the interests of the employees it represented, was accentuated by the fact that the individual NABET representatives present during the 1975 Negotiations were the NABET International President and 10th District Vice-President

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*The record herein has shown that it was absolutely imperative that CBS maintain confidentiality, in order to gain lead time over its competitors, and to enhance its image as an innovative leader in the use of new technology. Indeed, the parties have stipulated that CBS intended during the 1975 Negotiations to disclose trade secrets and confidential business plans which were to provide CBS with a competitive advantage. (A. 70-71, 255.)

(A. 91), and thus were highly placed union officials personally in contact with executives of the competitors of CBS. As Judge Bennett, and the Board by affirmation, concluded, "It defies credence that such a representative would ignore his responsibility to his constituents." (A. 268, 271.)

Most importantly, unlike in *General Electric, supra,* both Judge Bennett and the Board found that the danger confronting the negotiations in the instant case was indeed "clear and present," because CBS could not even begin to bargain with the option simply to withdraw when and if the event it feared actually occurred. Once confidential information was presented at the bargaining table, CBS would have no way to prevent its subsequent disclosure. Indeed, disclosure of confidential information by NABET could very well have occurred *after* the 1975 Negotiations were completed. For that reason, at the outset the *mere potential for abuse*—that is, the temptation available to NABET —was enough to foreclose meaningful bargaining, whether or not NABET actually did disclose information. *See, e.g., Bausch & Lomb Optical Co., supra,* a case involving an employer's lawful refusal to bargain with a union conducting a competing business, where the Board stated:

> ". . . We do not believe it is incumbent upon the Board to hold, in a situation such as involved here, which possesses latent dangers, that merely because the hazards which can be anticipated have not yet been realized, the Respondent-employer

> is nonetheless under a statutory duty to bargain. * * * *It is enough for us that it could and that the temptation is too great.*" 108 N.L.R.B. 1555 at 1562. (Emphasis added.)

Thus, the facts in the instant case clearly differ from those in *General Electric,* wherein both the Board and this Court found that the employer's refusal to bargain was in violation of Sections 8(a)(5) and (1) of the Act. There, the focus was on the effect upon the bargaining process of the *threat* of a multi-unit bargaining effort by unions which represented the employer's employees in a number of different bargaining units. The Board found that the employer's refusal to bargain at the *outset* of negotiations was not privileged, because at that stage a "clear and present danger" to meaningful bargaining had not *yet* been demonstrated, and this Court upheld that determination, stating as follows, in pertinent part:

> ". . . [W]e agree with the Board's rejection of a per se rule which bans mixed-union committees.
>
> "*In sum, we do not think that the Company has demonstrated the type of clear and present danger to the bargaining process that is required.* . . . We hold that the IUE did have the right to include members of other unions on its negotiating committee, . . . *so long as it sought to bargain on behalf of those employees represented by the IUE.* . . ." 412 F.2d 512 at 520. (Emphasis added.)

Hence, the employer in *General Electric,* unlike in the instant case, could have initially engaged in negotiations, with the option immediately to withdraw when and if the event it feared—forced multi-unit bargaining —actually occurred.* CBS did not have that option, and upon that basis, the Board found the result reached by it and this Court in *General Electric* to be inapposite. (A. 268, 271.)

The Unions, however, attempt to distort the above-described basis for the Board's decision. At p. 19 of their Opening Brief, they argue that Judge Bennett simplistically,

> ". . . [A]ccepted the contention of CBS that the *General Electric* decision is distinguishable because all of the unions who joined the IUE's bargaining committee in that case actually represented employees of General Electric."

In light of the foregoing discussion, however, it is clear that the Unions are being simplistic, and not the Board. The mere fact that NABET is an "outsider" which represents no CBS employees does not, alone, constitute the basis for the Board's distinction between the facts in *General Electric* and here. Rather, the Board's distinction is based upon a demonstrable difference between the nature and immediacy of the danger

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*Neither the Board nor this Court reached the question of whether an employer would be required to bargain if it was demonstrated that the mixed-union negotiating committee actually was bargaining on behalf of multiple bargaining units. However, four years later, in *Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. NLRB* (Shell Oil Company), 486 F.2d 1266 (D.C. Cir. 1973), the District of Columbia Circuit, by Chief Judge Bazelon, did reach that question, upholding the Board's determination that an employer is *not* required to participate in multi-unit negotiations.

to the bargaining process found to exist in each of the two cases.*

Likewise, the Unions also misleadingly suggest that CBS's refusal to bargain in the instant case raises the issue of whether a union may properly bargain on behalf of employees of competing employers. At pp. 30-31 of their Opening Brief, the Unions state, in pertinent part:

> ". . . It is natural to ask, therefore, whether, if the IBEW also represented NBC or ABC employees (and perhaps even more employees at those networks than at CBS), CBS would refuse to bargain with the IBEW on grounds similar to those advanced here. . . .
>
> "In other situations, the IBEW does represent employees of direct competitors, e.g. General Electric and Westinghouse, but no one has ever contended that either of those companies could refuse to bargain. . . ."

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*The Unions also cite *Independent Drugstore Owners of Santa Clara County*, 170 N.L.R.B. 1699 (1968). That case, however, is also distinguishable from the instant case. There, unlike here, the employer's primary concern was an alleged conflict of interest between the two unions present at the bargaining table, while confidentiality of the employer's business information was only raised as a secondary defense in a brief submitted to the trial examiner. Also, unlike here, the trial examiner was "unable to perceive any reason why . . . [the outsider] might find it to his advantage to reveal such information to competitors, even if such information could be of interest to such competitors." It is apparent, therefore, that the question of whether the threat of disclosure of confidential business information constitutes a "clear and present danger" to the bargaining process is one for determination by the trier of fact and the Board on a case-by-case basis, pursuant to the individual records therein. CBS's argument in this brief, and the Board's Decision below, stand for nothing broader than that proposition.

The short answer to the above passage is that CBS has never contended herein that it would refuse to bargain with the Unions, or any labor organization, solely because they represented employees of a competing employer. In fact, Mr. Sirmons, chief negotiator for CBS, testified as follows, in explaining why concerns regarding confidentiality would not arise if IBEW negotiator Andrew Draghi also bargained on behalf of employees of ABC and NBC:

> "Because Mr. Draghi has a responsibility for the CBS employees that he must protect, and Mr. Draghi, I am sure, understands and appreciates that the lead time which it is possible for CBS to achieve through modifications in his agreement, is a form of additional job security for the CBS people; and those people, he has a responsibility for." (A. 238.)

The crucial point is that IBEW, unlike NABET, does have a duty to represent the interests of CBS employees, and thus it necessarily has a stake in the economic viability of CBS. Representation of employees of CBS's competitors would not alter that situation.

Finally, the Unions suggest that CBS's argument regarding confidentiality is merely pretextual, masking ulterior motives. They argue that such pretext is demonstrated by CBS's unwillingness to pursue alternatives offered by the Unions during the 1975 Negotiations.

The Unions' contention, however, must certainly fail. It is clear that the Board's finding on the issue of confidentiality has substantial support in the record, in that CBS vigorously and consistently expressed its concern regarding confidentiality throughout the 1975 Negotiations, and in the proceedings below. The basis

for said concern by CBS is firmly documented in the joint stipulation agreed upon by all parties prior to the hearing before Judge Bennett, as follows in pertinent part:

> "Stipulated that during the course of the negotiations the Company intended to present information as to new equipment, and processes that come within the category of trade secrets and confidential business plans which would give the Company a competitive advantage over other broadcasters." (A. 255.)

Furthermore, the Board expressly found that none of the alternatives offered by the Unions to CBS was feasible. Thus, the Board found that piecemeal bargaining regarding proposals not involving disclosure of confidential information clearly was not possible, because meaningful bargaining necessarily involves a give-and-take, *quid pro quo* process wherein the parties' proposals are balanced against each other, and thus such piecemeal bargaining would have caused severe prejudice to CBS's proposals. (A. 267, 271.) In any event, such bargaining would have been particularly meaningless, in that the focal point of the 1975 Negotiations necessarily was going to be CBS's proposals for changes to accommodate new technological innovations in the field of electronics. Indeed, the Board found that, during the 1976 Negotiations, after a NABET representative was no longer present, proposals advanced by CBS thoroughly permeated the bargaining process, constituting approximately 75% of the negotiating time. (A. 268, 271.)

Likewise, the Board found that bargaining under a general pledge of confidentiality to be executed by

both committees was also not feasible, because adequate protection simply was not possible. (A. 269, 271). While the ongoing relationship between CBS and the Unions provided a deterrent effect on bad faith conduct by either of those parties, because of the disruptive influence such conduct would have on all future contract negotiations, no such deterrent effect was operative on NABET. Further, the Unions, unlike NABET, had a duty to represent the interests of CBS employees, and thus had an inherent interest in preserving the confidentiality of business information which would enhance the economic viability of CBS.*

Thus, under Section 10(e) of the Act, quoted above, CBS submits that the Board's findings regarding confidentiality have substantial support in the record, and must be deemed conclusive by this Court.

It is clear, then, that the consistent policy of CBS has been to endeavor to bargain openly and in good faith with the Unions. CBS did so during the 1972 and 1976 Negotiations, by fully disclosing confidential information regarding technological innovations and business plans which supported its proposals for contract changes.** During the 1975 Negotiations, CBS intended

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*Thus, with regard to the Unions' argument at p. 30 of their Opening Brief, the difference between a NABET representative sitting inside or outside the negotiating room is plain: in the latter situation, unlike the former, disclosure of confidential information by NABET would first have necessitated disclosure of that information *by the Unions*. For all the reasons set forth above, CBS considered itself adequately protected—so long as the NABET representative remained out of the room. For example, CBS did participate in bargaining negotiations for a brief period of time when the NABET representative was absent. (A. 111-112.)

**During the 1972 Negotiations CBS found such disclosure to be necessary in the face of the Unions' skepticism regarding the need for changes.

to do the same. However, as the Board found upon the factual record in the instant case, at the outset the presence of a NABET representative created a "clear and present danger" to such bargaining, and thus CBS exercised its rightful privilege not to bargain at all in such a situation. (A. 268, 271.) The only alternative course of action available to CBS was to continue bargaining without any explanation for the changes upon which it was insisting. Of course, CBS was aware that that type of conduct often has been the subject of refusal-to-bargain charges,* and in any event, that approach would not have succeeded in curing the impediment created by the presence of the NABET representative—the foreclosure of full and open discussion of major proposals. CBS submits, therefore, that the course of action it chose to follow was the one most consistent with the basic policy of the Act, as mentioned above: promotion of meaningful bargaining.

IV.

In Any Event, Independently of the Above Argument and in Addition Thereto, the Unions Possess No Express Right Under the Act to Select as Members of Their Negotiating Committee Persons Who Are Not Affiliated With the Unions.

Independently of the above argument and in addition thereto, CBS submits that the Unions possess no express right under the Act to select as members of their negotiating committee persons who are not

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*See, e.g., Oregon Coast Operators Association, 113 N.L.R.B. 1345 (1955), *enf'd. per curiam*, 246 F.2d 280 (9th Cir. 1957) [refusal to furnish data regarding equipment held to be an unlawful refusal to bargain].

affiliated* with the Unions. CBS believes that cases which have held otherwise are wrongly decided, and should not be followed. Although expressly requested to do so by CBS, Judge Bennett and the Board failed specifically to make the above ruling (*see,* A. 268); however, such a ruling is clearly warranted, and should be made by this Court.

Section 8(b)(1)(B) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce. . . .
>
> * * *
>
> "(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

Under that provision employers are expressly granted the right freely to select the members of their negotiating committee.

The Act, however, does not expressly grant a corresponding right to labor organizations. Section 7 of the Act only provides as follows:

> "*Employees* shall have the right to self-organize, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing,* . . . ." (Emphasis added.)

That language grants to individual employees the right freely to select their bargaining agent. It does not, in turn, grant to that agent the right freely to select members of its negotiating committee. The language of Section 7 is not the same as that of Section 8(b)

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*The word "affiliated", as used in this portion of the brief, is intended to include employees, agents, consultants, and attorneys retained by the Unions.

(1)(B), and does not grant to bargaining agents the same rights accorded employers. Under the well recognized rule of construction, "expressio unius est exclusio alterius," the difference in statutory language is significant: the express inclusion of free right of selection for employers excludes a similar right for unions if not also expressly stated. *See, e.g., J. Ray McDermott & Co., Inc. v. Vessel Morning Star,* 457 F.2d 815, 818 (5th Cir. 1972) ["Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded"].

The above distinction between rights of employers and bargaining agents reflects well-considered Congressional policy. A bargaining agent, unlike an employer, is an organization chosen by employees to represent them in bargaining and other matters. It thus has an obligation, for example, fairly to represent employees in all grievance proceedings. *See, e.g., Vaca v. Sipes,* 386 U.S. 171 (1967). Likewise, it has an implicit obligation to select individual collective bargaining negotiators who will fairly represent the interests of the employees who elected the bargaining agent in the first instance. It is the interests of those employees which Section 7 of the Act is designed to protect, from both the whims of the employer *and* the bargaining agent. *See, e.g.,* "Declaration of Purpose and Policy," 29 U.S.C. 141(b).

Thus, in *NLRB v. Kentucky Utilities Co., supra,* when the employer refused to bargain with a union negotiating committee which included an individual who had expressed intense hostility to the employer, the Sixth Circuit held that the employer's conduct was not an unfair labor practice, stating as follows:

> "*In view of the fact that Braswell was not personally chosen by the employees to represent them,* that the respondent at all times was willing to bargain collectively with the Union if Braswell only was eliminated as a negotiator, . . . we are of the opinion that so far as this aspect of the case is concerned, the action of the respondent was not an unfair labor practice. . . ." 182 F.2d at 813-814. (Emphasis added.)

Hence, CBS submits that the Unions may select as members of their negotiating committee only individuals who are affiliated with the Unions. Such a rule does not prohibit the exercise of any rights expressly granted to the Unions by the Act, and it does protect the § 7 rights of individual employees. CBS submits that *General Electric v. NLRB, supra,* and similar cases which have held otherwise, are wrongly decided and should not be followed herein. Of course, in any event, as demonstrated above, the facts of such cases are distinguishable from those in the instant case.

In the instant case, the NABET officials selected by the Unions as members of their negotiating committee were not affiliated with the Unions, and, as in *Kentucky Utilities, supra,* they were not personally selected by CBS employees. Accordingly, under the rule suggested above, the objection by CBS to the presence of those individuals did not constitute an unlawful refusal to bargain collectively with the Unions.

Indeed, § 8(a)(5) of the Act merely states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of *his* employees. . . ." (Emphasis added.) The NABET officials involved herein were *not* representatives of

the employees of CBS; rather, they were representatives of the employees of ABC and NBC. During the 1975 Negotiations, CBS simply objected to the presence of those individuals, while otherwise consistently indicating willingness to bargain collectively with the Unions—the representatives of its employees.

Conclusion.

For all the foregoing reasons, CBS contends that there is substantial evidence in the record considered as a whole to support the Board's finding that the membership of the Unions' negotiating committee constituted a "clear and present danger" to the bargaining process, and that the refusal to bargain by CBS was, therefore, not in violation of Sections 8(a)(5) and (1) of the Act. Accordingly, the Unions' petition for review and reversal of the Board's Decision and Order must be denied.

DATED: May 6, 1977.

Respectfully submitted,

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ADDENDUM.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §§ 151, et seq.), are as follows:

Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Sec. 8(a) "It shall be an unfair labor practice for an employer—

(1) "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . ."

(5) "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Sec. 8(b) "It shall be an unfair labor practice for a labor organization or its agents—

(1) "to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

(3) "To refuse to bargain collectively with an employer, ..."

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On May 6, 1977, I served the within

BRIEF OF INTERVENOR CBS INC. in re: "International Brotherhood of Electrical Workers AFL-CIO vs. National Labor Relations Board", in the United States Court of Appeals for the Second Circuit, No. 76-4227;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows: HON, JOHN S. IRVING, NLRB, 1717 Pennsylvania Ave., NW, Washington D. C. 20570; LIONEL RICHMAN, RICHMAN & GARRETT, 1336 Wilshire Blvd., Los Angeles, Ca 90017; LAURNCE J. COHEN, SHERMAN, DUNN COHEN & LEIFER, Ste. 801, 1125-15th St., NW, Washington D.C. 20005; DAVID I. ASHE, ASHE & RIFKIN, 225 Broadway, Ne New York New York 10007; STEPHEN M. KOPPEKIN, CBS INC., Law Department, 51 West 52nd St., New York, New York 10019;

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 6, 1977, at Los Angeles, California

Jean Drennen

Service of the within and receipt of a copy thereof is hereby admitted this .....6th..... day of May, A.D. 1977.

proof of Service Enclosed
